

Bodies, rights and abortion

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Abstract

The issue of abortion is discussed with reference to the claim that people have a right of control over their own bodies. Do people "own" their own bodies? If so, what would be entailed? These questions are discussed in commonsense terms and also in relation to the jurisprudence of Hohfeld, Honore, Munzer and Waldron.

It is argued that whether or not women are morally and/or should be legally entitled to have abortions, such entitlements cannot be derived from a general moral entitlement to do what we will with our own bodies since there is no such entitlement. Whether or not we "own" them, we can have rights duties, liabilities, restrictions and disadvantages as well as rights concerning our own bodies.

It is sometimes argued, or even implied as a self-evident truth that the pro-abortionists' case rests securely on the assumption that a woman has a fundamental right to do what she will with her own body. I shall question this approach to the abortion debate.

Bodies, rights and common sense

Consider the assumption at issue in the abstract: "That particular X is your X and, therefore, you are entitled to do what you want with it". As a matter of pure logic, the claim is an absurdity. What if "X" stands for a Thompson Machine Gun? Should we say: "That is your machine gun and, therefore, you can do whatever you like with it?" On the contrary, although there might be some things which you and only you can of right do to and with the gun, if that particular machine gun is your machine gun then it is incumbent upon you in particular to ensure that certain things are *not* done with it. Is the situation any different when "X" pertains to one's body or to parts of it? I do not think so. What about: "That is your voice and, therefore, you are entitled to say whatever you like with it?" Certainly not. Concerning what is said with one's own voice, one bears particular obligations of often, for instance,

intended reasonableness and truthfulness which one does not bear concerning what other voices say.

Homeowners are morally and legally entitled to paint the outsides of their front doors any colour they choose. None the less, the entitlement does not derive from an entitlement to do anything they like with their own houses, from a freedom from all obligations concerning how their houses are treated and controlled. Concerning his or her own home, a homeowner has particular *duties* as well as particular rights which other people do not have concerning his or her home. Analogously, we have particular moral duties as well as particular moral rights towards and concerning our own bodies.

According to Shaver:

"The assertion that a woman has the right to control her own body is an unambiguous statement of her proprietorship in her person, and the 'right to choose' an expression of her free will. These claims assume an essential individualism in which the woman properly acts in the pursuit of her own needs and wishes. Her rightful action is limited only by the freedom of others to do likewise".¹

Consider this together with another of Shaver's claims that: "The notion of individual rights is quintessentially liberal. At the heart of liberalism lies the proposition that the individual is the rightful possessor of his or her bodily capacities, what MacPherson has termed the ideology of possessive individualism".²

Here, Shaver paints only half of the picture of liberalism. It seems strange to talk of "rightful possession" of one's body or of its capacities but, insofar as one might/does, one should say that "rightful possession" of one's body and its capacities is the source of duties no less than of rights concerning it and them. Quintessential to liberalism is the notion of *individual moral autonomy* from which follows equally the potential for the possession of obligations and of rights concerning one's own body.

To say that we have duties concerning our own bodies would seem precisely to place limits on our rights concerning them. These limits are not where Shaver places them. For instance, in the middle of a restaurant, I have, because of my particular duties

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concerning my body (which I do not have concerning the bodies of other people and they do not have concerning mine) a duty to try not to vomit nor to belch loudly. None the less, *pace* Shaver, my rightful action here is not limited by the rights of others – since in that context they have no such rights – to belch loudly or to vomit.

Again, one might say that most duties which I have, including those physical, emotional and financial ones towards and concerning my wife, can be fulfilled only if my body remains relatively healthy. I have acquired too, along with our joint mortgage and the related endowment insurance policy, a duty not to commit suicide – an action which would render the policy null and void. One might paraphrase Shaver and say that: the assertion that a person has the *duty* to control his or her own body is an unambiguous statement of “his or her proprietorship in his or her own person” and the *duty* to choose to act in particular ways is an expression of his or her free will. Perhaps this expresses merely a partial truth and perhaps this statement would require qualification to be completely acceptable. Yet, it is no less acceptable as it stands than is Shaver’s claim that: “The assertion that a woman has the right to control her own body is an unambiguous statement of her proprietorship in her person, and the ‘right to choose’ an expression of her free will”.³

Shaver says that her assertion about rights is “unambiguous”. Is it? There are at least two everyday senses in which we talk about rights: rights of action and rights of recipience.

I have a right of action, say, to stand on my head or to pick up a discarded cigar butt from the gutter if and insofar as I am not under any obligation not to stand on my head nor to refrain from picking up the cigar butt. If I have such a right to stand on my head or to pick up the cigar butt, then my possession of these rights does not in itself correspond to nor impose obligations on other people. From my possession of these particular rights, other people are not thereby obliged, for instance, to try to help me to stand on my head nor to try to help me to pick up the cigar butt. Indeed, someone else in the street, approaching the cigar butt from a different direction from mine might, no less than I have, have a right of action to pick up the cigar butt and pick it up, thereby depriving me of the cigar butt without thereby depriving me of a right.

I have a right of recipience, say, to receive £5 from my next door neighbour and a right of (negative) recipience not to be killed by her if and insofar as she has a duty not to kill me and a duty to give me £5 (which, let us say, she borrowed from me last week). Rights of action are the absences of obligations. Rights of recipience of a person are rights which correspond to the duties of another or of others.

When Shaver says that: “The assertion that a woman has the right to control her own body is an

unambiguous statement of her proprietorship in her person . . .”, what she is saying is wrong: her assertion *is* ambiguous. She might be talking about a right of action or a right of recipience or both, perhaps, or neither.

The most obvious interpretation, it seems to me, is that she is talking about a moral right of action: the absence of moral obligation. Yet, she might be talking about a moral right of recipience. She might be saying, for instance, that other people have a moral duty not to try to prevent a woman from doing to and with her own body what she will. (She might even mean that other people have a moral duty to try to help a woman to do what she chooses to do and with her own body.)

In neither sense of the term “right” is it plausible to say *tout court* that, because one’s body is one’s own, one has a right to do what one wants with it: that one has no moral obligations concerning it; or that others are duty-bound not to interfere with – nor with one’s own decisions concerning – one’s own body.

Suppose that I stop to pick up a cigar butt or to stand on my head in the middle of a busy road. Other people are not necessarily duty-bound to tolerate my decision to control my body in this way. They might well be entitled – they might even have a duty – forcibly to relocate my body in a more suitable place. Even if I might sometimes have a right of action to stand on my head and to pick up a cigar butt, it does not follow – because my body is mine nor on any other grounds – that at all times and places I have these rights. That X is your X – that hand-grenade is your hand-grenade – yet it does not follow that you have no moral obligations which limit your legitimate use of it. It does not follow that, in any sense of the term, you must have a right to do with it what you will. If “X” stands for one’s body or for its capacities, then the logic of the assertion remains the same.

Because, say, one’s fertility is a capacity of one’s own body, one might have particular rights (perhaps of action and of recipience) concerning it but one will not necessarily be free of all obligations in relation to it nor will all other people thereby necessarily be encumbered with a duty not to interfere with one in one’s chosen manner of regulating one’s own fertility. They will not necessarily be encumbered with a duty to try to help one to do what one will concerning one’s fertility. Concerning one’s own fertility, one might have particular duties as well as particular rights of different sorts.

Property, bodies and jurisprudence

According to Munzer:

“In moral philosophy, thinkers have long wrestled with problems of suicide, slavery, self-enslavement, and abortion. Some of the ‘solutions’ proposed from time to time have either embraced, or repudiated,

the idea of owning or having a title to or property rights in oneself as morally relevant. A finer-grained taxonomy, like that advanced here, may help to draw morally pertinent distinctions more clearly than saying, or denying, that persons own their own bodies. The classification of body rights into personal rights and weak and strong property rights may help with these intellectual struggles".⁴

Hohfeld presents a vocabulary of four terms, his inter-related definitions of which he considers to be the basic concepts of law. The terms are: claim-right; privilege; power, and immunity.⁵

A claim-right is what I mean by a right of reciprocity. As Munzer explains Hohfeld's system of terms:

"A privilege is a legal liberty or freedom. It involves not a correlative duty but the absence of a right on someone else's part to interfere. A claim-right is also quite different from a power. A person has a legal power when, by some act, he can alter his legal position or that of someone else. The correlative of a power is a liability".⁶

For instance, I have a legal power to sell to you – thus altering the legal position of both of us – the word-processor on which I am now working in my home in Paisley. Correlatively, you can have the liability – where a "liability" in Hohfeld's sense need not be disadvantageous – to receive the machine from me. I do not have the legal power to sell to you the computer on which, when I am working at my place of employment, I work although I might have the illegal capacity to do so.

Munzer continues:

"Finally, a claim-right differs from an immunity. An immunity is a lack of susceptibility to having one's legal position altered by someone else. . . . If B cannot legally compel A to sell his farm, A has an immunity with respect to B's forcing the sale of the farm. Correlatively, B has no power to force a sale".⁶

Munzer combines Hohfeld's analysis with that of Honore. Munzer says of the latter:

"He sought to specify the standard 'incidents' of ownership common to Western legal systems. These incidents are jointly sufficient, though not individually necessary for ownership. Honore's list of incidents, slightly modified, includes the claim-rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude and abandon; the liberties to consume or destroy; immunities from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment. If a person has all of these incidents, or most of them, with respect to a certain thing, then he or she owns it".⁷

To the question of whether we own our own bodies, Munzer does not give an unqualified "yes" or "no". Because we cannot sell them, he is reluctant to say that we own our own bodies, that they are our property. Munzer argues that, rather than owning our bodies, we have limited property rights in them. Furthermore, he argues, we also have rights other than property rights in and concerning our bodies.

An absence of the power of transfer is the defining feature of what Munzer considers to be personal, ie non-property body rights. For instance, my right of free speech is, among other things, a right concerning my body since I need to use my voice to speak. However, since I cannot transfer my right of free speech to another person in the sort of way that I can, say, sell my word-processor or my hair, it is not a property right. You might use what used to be my word-processor: you could not use what used to be my right of free speech. You can possess and use more than one word-processor: you cannot similarly possess and use more than one right of free speech.

For Munzer, weak as opposed to strong property rights exist when there is the power to transfer but not to sell.

Munzer writes:

"Taken jointly, the body rights of each person amount not to ownership but only a weaker package of limited property rights. Considered individually, the body rights of each person are not all in the same boat. Most body rights are personal rather than property rights; examples are rights not to be murdered, not to be searched without a warrant or just cause, not to be compelled to testify against oneself, not to be libelled or slandered, to speak freely, and to exclude others from sexual or other physical contact. Some body rights are property rights – whether weak such as rights to donate an organ upon death or strong, such as the right of publicity or the right to sell blood or semen; but these weak or strong rights are neither so numerous nor so central as to establish that persons 'own' themselves".⁸

Even if we do not own our bodies, we can still have rights (and duties) concerning them, as Munzer's analysis suggests. Munzer also shows that, as a general thing, property ownership carries duties, liabilities and disadvantages as well as rights. Hence, I think that we can say, even if we do own our bodies, we can still have duties and so forth (and rights) concerning them.

Munzer writes:

"The idea of *property rights* is narrower than that of property. Property rights involve only advantageous incidents. Property involves disadvantageous incidents as well. Meant here is advantage or disadvantage to the right-holder or owner. Although property obviously involves disadvantages to persons other than the right-holder, it is important to see that there can be disadvantages to the right-holder as well.

Suppose that someone owns a single-family home in a suburban area. Then she has a duty not to use it in ways prohibited by the law of nuisance or by zoning regulations. She may be disabled from transferring it to others with burdensome restrictions – for example, that no one may use it save for unduly limited purposes. If someone wins a court judgment for damages against her, then, subject perhaps to homestead laws, she has a liability that the homestead be sold to pay the judgment. The duty, disability, and liability are disadvantageous to her. It would be odd to say that they are part of her property rights in her home. But they are part of what is involved in saying that the home is her property”.⁹

Waldron also emphasises that ownership of property entails liabilities as well as their opposites.¹⁰ However, Waldron is less reluctant than Munzer to deny on the basis of non-transferability that we cannot own our own bodies. He writes:

“I can be the owner of something in the sense that it is for me rather than for anyone else to make decisions about its use (and in the sense that society will back up my decisions with force if need be), without it being the case that I can, by my say-so, transfer exactly that power of decision over the resource to somebody else”.¹¹

In discussing Locke’s theory of property, Waldron notes that:

“Locke does not say or require in his theory of appropriation that we should have property rights in our bodies. The term he uses is ‘*person*’: ‘every man has a Property in his own Person. This no Body has any Right to but himself’ . . . given the general character of his position, it is much more plausible for him to say that a man has creator’s rights over his person than that he has them over his body”.¹²

This distinction highlights another possible ambiguity in Shaver’s treatment of abortion. She talks about both a woman’s “proprietorship in her person” and of the individual’s being “the rightful possessor of his or her bodily capacities”. Are there two sorts of ownership which are being suggested here or does “person” in this context mean “body”?

Conclusion

My own view is that talk of ownership of one’s person rather than of one’s body is absurd. A person cannot be distinguished here from what the person is being said to own. For it to be possible for A to own X, A and X must be, like a person and a person’s body, conceptually separable (even if, like husband and wife, they are conceptually relatable).

I do not know what should be said, overall, about

the legal, quasi-legal and moral senses in which one might be said to own one’s own body. I am tempted to say that if *only one person ever could* own such and such then no one *does* own it. I cannot transfer to another the ability to control my actions *in the way that I am able to control them* and, thus, can be responsible for them. I feel that this sort of responsibility and control is, thereby, something different from property but perhaps my feeling is whimsical. Perhaps we should say that the relationship between ourselves and our bodies is *like* that of normal ownership in some respects but not in others and leave it at that.

Property is a bundle of particular rights, privileges, duties and powers rather than a general duty and/or right. The question of ownership in relation to anything at all is complex. It is no less complex in relation to bodies, including our own. Concerning my body, I can control it in a way that no one else can. Similarly, I need it in a way which no one else does and experience pain and pleasure regarding it in a way which no one else does. From these considerations, and perhaps other ones, arise particular rights, powers, privileges, responsibilities and duties which I have concerning my body and which other people have concerning theirs. In this, I agree with Shaver although I emphasise the possibility of duties no less than of rights.

Whether or not we “own”, in any sense of the term, our own bodies and/or our bodily capacities or our “persons” does not seem to be crucial here. Ownership can be a basis of the possession of rights and duties but it is not a prerequisite for their possession. Whether or not we own our bodies and/or our bodily capacities, we can still have rights and duties concerning them. It is not obvious that the answer to the question of whether or not we have property in either our bodies or in our “persons” can settle the issues: does one have a moral entitlement or any other sort of moral right to have an abortion?; should one have a legal entitlement or any other sort of legal right to have an abortion?

I have not tried to argue against the pro-abortionist case as such but against the claim that it can be established in a straightforward way from the assertion that we have property in our bodies or “persons”. Independently of whether or not we have such property, we can have rights and duties concerning our own bodies. What these rights and duties happen to be is a question which my comments here leave open.

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References

- 1 Shaver S. Body rights, social rights and the liberal welfare state. *Critical Social Policy* 1993/1994; 39: 70.

2 See reference 1: 69.

3 See reference 1: 70

4 Munzer SR. *A theory of property* Cambridge: Cambridge University Press, 1990:54-5.

5 Hohfeld WN. *Fundamental legal conceptions as applied in judicial reasoning*. Westport: Greenwood Press, 1978.

6 See reference 4: 18.

7 See reference 4: 22-3.

8 See reference 4: 57.

9 See reference 4: 11.

10 Waldron J. *The right to private property* Oxford: Clarendon Press, 1988:27.

11 See reference 10: 399.

12 See reference 10: 178;180.

News and notes

Medical ethics and the law

A conference on Medical Ethics and the Law will be held on the 18th of June at the Scientific Society's lecture theatre, New Burlington Place, London.

Topics to be covered include: implementing ethical policies for doctors and managers; managing resource allocation and understanding advance directives.

Special emphasis will be placed on three difficult areas of practice: assessing mental capacity to refuse treatment; decisions on withdrawal of treatment, and medico-legal issues in emergency caesareans.

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